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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

Requests for Clarification of the Commission's Rules Regarding Interconnection Between LECs and Paging Carriers	))))	CCB/CPD Docket No. 97-24

APPLICATION FOR REVIEW OF SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL, AND NEVADA BELL

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EXECUTIVE SUMMARY

Under the legal regime that existed prior to the Telecommunications Act of 1996, paging carriers interconnected with LECs' networks by purchasing dedicated facilities, priced according to state tariffs and/or voluntary agreements. The Common Carrier Bureau recently ruled that those state tariffs and agreements are preempted by Commission regulation. Specifically, the Bureau ruled that LECs are prohibited from charging paging carriers for the dedicated facilities used to connect a LEC's network to a paging carrier's terminal. The Bureau was clearly wrong: not only does this interpretation lack any basis in the Commission's regulations or orders, but it also contravenes the letter and spirit of the Telecommunications Act of 1996. The Commission should expeditiously reverse the Bureau's ruling.

I. The Bureau cited as authority for its decision 47 C.F.R. § 51.703(b) and the Commission's Local Competition Order.[1] The regulation at issue states that a "LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." 47 C.F.R. § 51.703(b) (emphasis added). The Local Competition Order, in turn, directs LECs to "cease charging a CMRS provider or other carrier for terminating LEC-originated traffic" and to "provide that traffic to the CMRS provider or other carrier without charge." Local Competition Order 11 FCC Rcd at 1016, ¶ 1042 (emphasis added); see also id. at 16043, ¶ 1092. These provisions all refer to traffic, not to facilities.

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[1]First Report and Order, Implementation of the Local Provisions in Telecommunications Act of 1996, 11 FCC Rcd 15499, modified on reconsideration, 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, Nos. 97-826, -829, -830, -1075, -1087, -1099, -1141 (Jan. 26, 1998).

The Bureau wrongly stated that there is "no basis" for distinguishing between traffic and facilities in this context. In fact, the distinction between charges for traffic and charges for facilities is fundamental to the nature of the legal rights and responsibilities of LECs and paging carriers under both the old and the new interconnection regimes. The Commission's regulations and Order demonstrate that it knows the difference between facilities charges and charges for traffic; the Bureau's failure to distinguish the two was thus clear error.

II. Even if section 51.703(b) applied to facilities charges -- which it does not -- the Bureau's ruling was nonetheless erroneous because the regulations that the Commission adopted in Subpart H of Chapter 51 simply do not apply to paging carriers. First, the Commission's own definition of reciprocal compensation requires a mutual exchange of compensation and traffic; in the absence of reciprocal compensation, the provisions of Subpart H do not apply. Second, under the Commission's definitions of "transport" and "termination," paging carriers do not transport or terminate traffic and therefore are not entitled to compensation under the Act or the Commission's regulations. Nothing in the Local Competition Order negates the clear language of the regulation; in all events, where the language of the order and the language of the regulation are in tension, it is the regulation that governs.

III. The Commission has no power under the statute to preempt valid state tariffs and private contractual interconnection agreements as the Bureau has purported to do. Section 251(b)(5) does not provide such authority, for its terms do not apply to paging carriers. And to the extent that the Bureau attempted to apply the requirements of section 251 outside the negotiation of interconnection agreements pursuant to section 252, the Bureau acted without statutory authority. The Bureau's interpretation, if allowed to stand, would thus contravene the well-established

principle that state regulation in an area of traditional state concern may be preempted only where Congress has clearly indicated its intention to do so.

IV. As a matter of policy, the Bureau's decision is extremely ill-advised. As the SBC LECs show in greater detail in their forthcoming Petition for Stay, if the Bureau's decision is allowed to stand -- indeed, if it is not stayed -- they will find it necessary to begin reconfiguring their networks to provide interconnection with the paging carriers. Such reconfiguration would be costly for LECs and paging carriers alike. Nothing in the Commission's regulations supports -- let alone requires -- such a perverse result.

As a result of the substantial and irreparable harm that the Bureau's decision will cause if it is not stayed, the SBC LECs request that the Commission act within 15 days on its stay request. If the Commission has not acted by that date, the SBC LECs will be forced to seek appropriate relief in court at that time.

V. Finally, the Bureau's order it would effect an unconstitutional taking of the SBC LECs' property without just compensation.

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APPLICATION FOR REVIEW OF SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL, AND NEVADA BELL

The Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell ("SBC LECs") hereby apply to the Commission for review of the decision of the Common Carrier Bureau regarding the application of 47 C.F.R. § 51.703(b) to paging carriers that do not originate any local telecommunications traffic. See Letter from A. Richard Metzger, Jr., Chief, Common Carrier Bureau, to Mr. Keith Davis, et al., DA 97-2726 (rel. Dec. 30, 1997) ("Metzger Letter"); 47 C.F.R. § 1.115. That decision was clearly wrong under the Commission's regulations: the regulations that the Bureau relied upon do not apply to facilities; and the Bureau's reading of the regulations is invalid under the Telecommunications Act of 1996. The Bureau's decision, moreover, poses a threat of grave harm to the SBC LECs and paging carriers alike. The Commission should therefore move expeditiously to overrule the Bureau's decision.

BACKGROUND

This controversy began with a dispute among LECs and paging carriers over payment for dedicated facilities, purchased by paging carriers under state tariffs and/or voluntary agreements,

used to connect LECs' switched local networks with the paging carriers' terminals. In January 1997, the paging carriers asked the Bureau to rule that under the Commission regulations -- in particular, 47 C.F.R. § 51.703(b) -- paging carriers are no longer required to pay for such facilities. On March 3, 1997, the Bureau issued a letter stating only that, in its view, the Commission's regulations prohibited a LEC from charging paging carriers for traffic that originates on the LEC's network. See Letter from Regina Keeney to Cathleen A. Massey, et al. (Mar. 3, 1997). This ruling -- though erroneously reasoned -- was of little concern to the SBC LECs, because they do not impose charges for traffic originated on their networks.

Despite the Bureau's narrow ruling, several paging carriers unilaterally suspended payment for facilities provided by the SBC LECs. As Southwestern Bell Telephone Company ("SWBT") detailed in a letter to the Commission, several paging carriers were receiving (and continue to receive) services and facilities from SWBT for free, at SWBT ratepayers' expense. See Letter from Paul E. Dorin to Regina M. Keeney (May 9, 1997). At the Bureau's suggestion, SWBT asked for clarification that nothing in the Commission's regulations prevents a LEC from recovering facilities charges -- as distinguished from charges for traffic -- from a paging carrier who requests those facilities. The paging companies quickly opposed SWBT's request and urged the Bureau to rule that facilities charges are indistinguishable from charges for traffic.

The Bureau, after putting SWBT's request out for comment, eventually ruled that the paging carriers were correct: according to the Bureau's ruling, "the Commission's current rules do not allow a LEC to charge a provider of paging services for the cost of LEC transmission facilities that are used on a dedicated basis to deliver to paging service providers local

telecommunications traffic that originates on the LEC's network." Metzger Letter at 3. The SBC LECs now seek Commission review.

ARGUMENT

I. NOTHING IN THE COMMISSION'S REGULATIONS PERMITS ELIMINATION OF EXISTING CHARGES FOR FACILITIES DEDICATED TO PAGING CARRIER INTERCONNECTION

It is undisputed that paging carriers have been purchasing, pursuant to valid state tariffs and/or voluntarily negotiated agreements, dedicated facilities used to interconnect with the SBC LECs' networks. The Common Carrier Bureau can preempt such valid state tariffs only if the Commission has adopted lawful regulations expressly authorizing such action. See 47 C.F.R. § 0.291(a)(2) ("The Chief, Common Carrier Bureau shall not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.") There is nothing in the Commission's regulations, or in the Local Competition Order, that manifests any intention to preempt such facilities-based charges; the Bureau therefore lacked the authority to take such action.

Charges for facilities -- which include non-recurring installation fees and monthly recurring fees for the point-to-point connections between LEC and paging networks -- are charges to recover the costs of providing and maintaining the facilities themselves. Facilities charges are not imposed to recover the cost of the traffic delivered over those facilities. The SBC LECs incur costs in providing facilities whether or not traffic is sent over those facilities; the costs of, and charges for, a facility are constant regardless of the volume of traffic sent over it. Facilities charges therefore are not -- as either a factual or a legal matter -- charges for "traffic."

In contrast to facilities charges, charges for "traffic" are imposed to recover the cost of individual calls. For each call, costs are incurred based on the network facilities used to deliver that call. These usage-sensitive charges are considered charges for traffic, because charges are imposed per-call and per-minute of such traffic. The larger the number of calls, and the longer their duration, the higher the charge.

The record should be entirely clear on this point: the SBC LECs have imposed no usage-sensitive charges on paging carriers for traffic that originates on their networks. Nor did SWBT's letter to the Bureau in any way intimate any intention to impose such charges for traffic. Instead, SWBT sought only to continue recovering the costs of dedicated facilities provided to paging carriers under valid state tariffs and voluntary agreements. The Bureau's response to SWBT's request -- purporting to prohibit such cost recovery -- was clear error.

There is simply no language anywhere in the Local Competition Order or in the Commission's regulations that requires LECs to provide facilities for interconnection to paging carriers -- or to anyone else -- for free. To do so would be ludicrous: the dedicated facilities used to bring traffic into the paging carrier's terminal would not be there at all but for the paging carrier's request for the facilities and its concomitant obligation to pay the established rate for those facilities. The state commissions have therefore made no provision for the SBC LECs to recover these costs from their ratepayers; indeed, there is no reason that other consumers of LEC services should subsidize the paging carriers.

Although the Bureau decided to the contrary, it offered scant explanation for its view. The Bureau simply quoted section 51.703(b) of the Commission's regulations, which states that a "LEC may not assess charges on any other telecommunications carrier for local

telecommunications traffic that originates on the LEC's network." 47 C.F.R. § 51.703(b) (emphasis added). The Bureau then noted that the Commission had read this regulation to require LECs to "cease charging a CMRS provider or other carrier for terminating LEC-originated traffic" and to "provide that traffic to the CMRS provider or other carrier without charge." Local Competition Order, 11 FCC Rcd at 16016, ¶ 1042 (emphasis added). Confronted with the fact that the Commission referred only to traffic -- a term that plainly signifies usage-based charges -- and never to facilities, the Bureau stated baldly that it found "no basis for the argument . . . that LECs are permitted to assess charges on CMRS carriers to recover the costs of facilities that are used by LECs to deliver traffic to CMRS carriers." Metzger Letter at 2.

The Bureau's position cannot stand. First, the Bureau ignored clear indications in the Commission's discussion that it did indeed wish to distinguish between usage-sensitive charges for traffic on the one hand and flat-rated charges for dedicated facilities on the other. The Bureau started by ignoring the context of the Commission's statement in paragraph 1042 of the Order. The Commission prefaced that statement by noting that "section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic." Local Competition Order, 11 FCC Rcd at 16016, ¶ 1042 (emphasis added). At the time that order was adopted, all LECs, as far as the SBC LECs are aware, imposed facilities-based charges under valid state tariffs or pursuant to private agreement. Some LECs, on the other hand, operated under tariffs that additionally imposed usage-sensitive charges for traffic. It was obviously this latter type of charge that was the focus of the Commission's concern.

Second, the Commission has shown that, when it wishes to address facilities-based charges, it knows how to do so explicitly. In section 51.709(b), for example, the Commission

referred to the rates for "a carrier providing transmission facilities dedicated to the transmission of traffic." See 47 C.F.R. § 51.709(b) (emphasis added).[2] Likewise, in the Local Competition Order, the Commission discussed at some length "the rates for transmission facilities that are dedicated to the transmission of traffic." Local Competition Order, 11 FCC Rcd at 16027, ¶ 1062.[3] The Commission could easily have stated that LECs are required to cease charging for traffic and for dedicated transmission facilities; its failure to do so is strong reason to conclude that it did not intend to do so. The Bureau ignored this argument entirely, even though it was

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[2]Section 709(b) does not otherwise support the paging carrier's position below; the Bureau did not rely on that provision, or even cite it, and for good reason. First, as several paging carriers have themselves pointed out, section 709(b) applies by its terms only to "transmission facilities dedicated to the transmission of traffic between two carriers' networks." 47 C.F.R. § 51.709(b) (emphasis added). But traffic does not flow between the LEC's network and a paging carrier's network; instead it flows only one way: from the LEC network to the paging carrier's terminal. Moreover, because there is never a calling path established between the LEC's network and the paging carrier's end-user, there is no traffic flowing from one network to the other at all -- rather, the traffic stops at the paging carrier's terminal.

Second, no party has ever suggested that section 51.709(b) applies in any context other than negotiated interconnection agreements reached pursuant to 47 U.S.C. § 252. The Commission made clear that section 709 applies to rate-making by state commissions in the context of establishment of transport rates under the procedures of section 252. See 47 C.F.R. § 51.709(a) (vacated by Iowa Utils. Bd. v. FCC, 120 F.3d 753, 800 n.21 (8th Cir. 1997) cert. granted, Nos. 97-826, -829, -830, -831, -1075, -1087, -1099, -1141 (Jan. 26, 1998)); Local Competition Order, 11 FCC Rcd at 16027, ¶¶ 1061, 1062.

[3]Arch Communications mistakenly claims that paragraph 1062 supports the paging carriers' position. See Comments of Arch Communications at 12-13 (filed June 13, 1997). Indeed, paragraph 1062 strongly suggests that, in prescribing regulations governing the rates for dedicated transmission facilities, the Commission simply did not contemplate the case of one-way transmission to paging carriers. The Commission did state that a carrier may not charge another carrier for transmission facilities used to send the providing carrier's traffic to the interconnecting carrier. But this statement related explicitly to the situation where a providing carrier is able to recover the full cost of one-way trunks in the opposite direction. The discussion simply emphasizes that paging carrier interconnection is a square peg that does not fit into the round hole of CMRS interconnection as generally described in the Local Competition Order.

elaborated upon at length in the SBC LECs' Comments. See Comments of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell at 7-10 (filed June 13, 1997).

When the Commission said that LECs must cease charging for traffic originated on the LECs' network, it meant what it said and no more. As the foregoing discussion shows, the distinction between charges for traffic and charges for facilities is significant under the old interconnection regime just as it is under the new. The Commission showed that it knew how to distinguish the two. The Bureau, in contrast, showed the opposite.

II. UNDER THE PLAIN LANGUAGE OF THE COMMISSION'S REGULATIONS, PAGING CARRIERS DO NOT QUALIFY FOR RECIPROCAL COMPENSATION

Many of the paging carriers who filed Comments in the proceeding below acknowledge that the Commission's rules governing LEC-CMRS reciprocal compensation were drafted with two-way providers -- especially cellular providers -- in mind. See, e.g., Comments of Metrocall, Inc. at 6 n.5 (filed June 13, 1997). What the paging carriers fail to acknowledge is that the rules do not merely ill-fit LEC-paging interconnection; they do not fit at all. Despite some ambiguous and self-contradictory language in the Local Competition Order, the paging carriers are not entitled to reciprocal compensation under the plain terms of the Commission's regulations. In other words, even if section 51.703(b) could be read to prohibit LECs from charging for facilities used to deliver traffic to the paging carrier -- which it cannot -- the fact is that section 51.703(b) does not apply to paging carriers at all.

A. By Their Terms, the Commission's Reciprocal Compensation Regulations Do Not Apply to LEC-Paging Interconnection

Section 703 is one of the regulations adopted by the Commission in Subpart H of Chapter 51 of the Commission's Rules, entitled "Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic." Section 701(a) states that "[t]he provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers." 47 C.F.R. § 51.701(a). The regulations then define "reciprocal compensation," for purposes of Subpart H, as an arrangement "in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." 47 C.F.R. § 51.701(e). Interconnection between LECs and paging carriers cannot fall within this definition, for at least two reasons.

First, the express terms of section 701(e) require mutual exchange of compensation and traffic for there to be a "reciprocal compensation arrangement." 47 C.F.R. § 51.703(e). Each of the carriers must receive compensation from the other. But as each party to this proceeding must concede, no traffic originates on the network of paging carriers to be terminated on the LECs' networks. And under the Bureau's interpretation of section 51.703(b), LECs would thus receive no compensation at all from paging carriers. Such an arrangement simply does not qualify as "reciprocal compensation" under the plain language of the Commission's rules.

Second, reciprocal compensation refers to compensation "for the transport and termination" of traffic. The terms "transport" and "termination" are defined in sections 701(c)

and 701(d) of the Commission's rules. Under these definitions, paging carriers never terminate traffic. And so long as the point of interface of the paging carrier's network and the LEC's network is located at the paging carrier's terminal -- as the paging carriers insist it is, see, e.g. Reply Comments of Arch Communications at 14 (filed June 27, 1997) -- the paging carriers do not transport traffic either.

Section 701(d) defines "termination" as follows: "For purposes of this subpart, termination is the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises." 47 C.F.R. § 51.701(d). Under this definition, the "termination" function requires the carrier receiving the call to "switch" the traffic. But paging carriers simply do not "switch" traffic. Switching is defined as "[c]onnecting the calling party to the called party." Newton's Telecom Dictionary 578 (11th ed. 1996). But a paging terminal never establishes a two-way communications path; the only "party" with whom the caller connects is the paging terminal itself. When a paging terminal receives a call, it captures the information provided by the calling party, and (if the calling party has not already done so) it then disconnects the call. The paging terminal then forwards the stored information through a radio broadcast transmission. A paging terminal thus performs a "store and forward" function, much like a sophisticated telephone answering machine or a telephone answering service. It does not "switch" the call. And because the paging terminal does not carry out this switching function, the paging carrier does not perform call "termination" as defined under the Commission's rules.

Nor do paging carriers provide "transport" of telecommunications. Section 701(c) defines "transport" as follows: "[T]ransport is the transmission and any necessary tandem switching of

local telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC." 47 C.F.R. § 51.701(c).[4] Under this definition, paging carriers do not perform transport for at least two reasons. First, where LECs provide the transport facilities between the LEC network and the paging terminal -- the situation at issue here -- paging carriers provide no transport whatsoever. In this situation, the "interconnection point" between a paging carrier's network and the LEC's network is at the paging terminal. Obviously, if the interconnection point and the paging terminal -- i.e., the called party -- are located at the same point, there is no transport between the two. Moreover, because the paging terminal does not "switch" traffic, but merely stores and forwards information, it cannot be considered an "equivalent facility" to an end office switch.

B. Nothing in the Local Competition Order Negates the Plain Meaning of the Reciprocal Compensation Regulations

In their comments below, the paging carriers sought to overcome the clear language of the Commission's regulations by citing some decidedly ambiguous -- indeed, self-contradictory -- discussion in the Local Competition Order, principally paragraphs 1008 and 1092. Paragraph 1008 states that "LECs are obligated, pursuant to section 251(b)(5) . . . , to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, pursuant to the rules governing

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[4]In addition to the two reasons discussed below, the reference to section 251(b)(5) in this definition precludes its application to whatever functions the paging carrier performs, because paging carriers do not qualify for reciprocal compensation under that section; the traffic transmitted to them is therefore not "traffic subject to section 251(b)(5)." See discussion infra at 12-14.

reciprocal compensation set forth in Section XI.B. [sic] below." Local Competition Order, 11 FCC Rcd at 15997, ¶ 1008. The Commission may have generally thought that reciprocal compensation would apply to paging carriers pursuant to the Commission's rules.[5] As the foregoing discussion demonstrates, however, the rules do not require such reciprocal compensation arrangements for paging carriers -- indeed, such arrangements are not even possible -- because paging carriers do not originate traffic that terminates on the LECs' networks.

In sum, nothing in the text of the Local Competition Order contradicts the plain language of the Commission's rules; these rules make clear that interconnection between LECs and paging carriers is not subject to reciprocal compensation so long as paging carriers do not originate, transport, or terminate traffic. But even if the language of the order were in tension with the Commission's rules, under settled Commission precedent it is the rules, not the commentary, that control. See, e.g., Memorandum Opinion and Order, Amendment of Part 90, Subparts M and S of the Commission's Rules, 4 FCC Rcd 356, 359 [¶ 33] (1989).[6]

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[5]Similarly, the discussion in paragraph 1092 focuses on mutual compensation which requires a quid pro quo.

[6]For this reason, there is no merit to the suggestion, advanced below by some paging carriers, that SWBT was attempting improperly to secure reconsideration of the Commission's Local Competition Order. Absent the patently erroneous interpretation of the Common Carrier Bureau, nothing in the Commission's valid regulations or in the Local Competition Order (properly understood) is inconsistent with the interests of the SBC LECs. Even the Bureau's March 3 letter, while based on a faulty legal premise (i.e., that 47 C.F.R. § 51.703(b) applies to paging carriers at all) caused the SBC LECs no concrete harm, because the SBC LECs have not imposed usage-based charges on paging carriers since before the effective date of the Local Competition Order.

Because several paging carriers had seized on the Common Carrier Bureau's faulty interpretation as a basis for withholding payment of facilities charges that they were obligated to pay under valid state tariffs, SWBT filed for clarification with the Bureau, on the Bureau's

III. THE BUREAU'S INTERPRETATION OF SECTION 703(b) VIOLATES THE TELECOMMUNICATIONS ACT OF 1996

To resolve this controversy, the Commission need go no further than to correct the Bureau's failure to distinguish between facilities charges and traffic charges. But the Commission cannot properly affirm the Bureau's decision, for to do so would violate the Telecommunications Act of 1996 in at least three different ways. First, it would purport to impose a non-mutual compensation obligation under section 251(b)(5), though nothing in the Act permits it. Second, it would purport to impose the obligations of section 251 on LECs outside of the negotiation process established by section 252. Third, such a decision would exceed the agency's statutory preemption authority.

A. Section 251(b)(5) Does Not Authorize Imposition of Non-Mutual Compensation Obligations

Two provisions of the Act address "reciprocal compensation." Section 251(b)(5) provides that all local exchange carriers must "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5)(emphasis added). That section thus contains two important requirements. First, it requires that compensation arrangements be reciprocal. The ordinary meaning of the word requires an exchange or mutual arrangement: "[r]eciprocal describes an equivalence, balance, equal

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recommendation, to resolve quickly what should have been a straightforward issue. The Bureau's response not only was late in coming, but also threatens to create a regulatory morass that will mire efforts to produce more efficient interconnection arrangements between paging carriers and LECs. Simply put, the Bureau's December 30 letter was the first effort by any FCC office (wrongly) to apply the regulations of Subpart H to paging carrier-LEC interconnection in a way that affected the SBC LECs' interests. SWBT's intervention could not have been more timely.

counteraction, equal return, or equal sharing." Webster's Third New International Dictionary 1895 (1993). Compensation is reciprocal, therefore, only if both sides of the transaction originate, transport, and terminate traffic. Second, the compensation obligation extends only to the transport and termination of telecommunications.

Section 252(d)(2)(A), which establishes the pricing standards for transport and termination, amplifies the requirements of § 251(b)(5). It states that "terms and conditions for reciprocal compensation" are not to be considered "just and reasonable unless," inter alia,

> such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier.

47 U.S.C. § 252(d)(2)(A)(i) (emphasis added). In other words, if section 251(b)(5) leaves any room for doubt on this score, section 252(d)(2)(A)(i) confirms that reciprocal compensation arrangements must be genuinely reciprocal.

Paging carriers are thus not entitled to reciprocal compensation under the Act: because they do not originate calls that terminate on LECs' networks, there can be no mutual exchange of traffic between paging carriers and LECs as required by the plain terms of sections 251(b)(5) and 252(d)(2). Likewise, because LECs do not receive traffic from paging providers, they cannot receive any transport or termination compensation from paging providers, and there can be no "mutual and reciprocal recovery [of costs] by each carrier" as required by section 252(d)(2).

Contrary to the provisions of section 251(b)(5), the paging carriers here seek unilateral compensation arrangements -- the very antithesis of reciprocity. The Bureau's interpretation of

the Commission's regulations would require just such unilateral compensation arrangements, preventing LECs from recovering their costs, and would therefore plainly violate the Act.[7]

B. The Obligations of Section 251 Must Be Implemented Pursuant to the Procedures Established by Section 252

Section 251(c)(1) provides that incumbent LECs have a "duty to negotiate in good faith in accordance with section 252 . . . the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection." 47 U.S.C. § 251(c)(1). But this duty too is reciprocal, not unilateral; that is, "[t]he requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements." Id. Section 252, in turn, establishes the procedures for voluntary negotiation, possible mediation, and eventual compulsory arbitration of interconnection agreements, all potentially subject to review in federal district court. See generally 47 U.S.C. § 252(a)-(e).

The Common Carrier Bureau, however, utterly ignored the significance -- indeed, even the existence -- of the section 252 procedures. As BellSouth pointed out in its Comments below, this error invalidates the Bureau's ruling. See Comments of BellSouth 2-6 (filed June 13, 1997). The Act makes clear that telecommunications carriers have a choice: they can continue to accept service under existing state tariffs, or they can request interconnection under section 251 and negotiate new terms. The Common Carrier Bureau, however, purported to bypass the section

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[7]In fact, the Bureau's ruling would appear to prevent states from approving agreements that permit recovery of LEC costs for transport, which would interfere with state commissions' obligations to approve agreements that allow for the recovery of costs. Compare § 252(a)(1) with § 252(e)(2)(B).

252 process and imposed unilateral obligations on the LECs in the absence of agreement. This action has no statutory basis and must therefore be set aside.

C. The Act Does Not Permit the Commission to Preempt Valid, State-Authorized Facilities Charges

The Commission must reject the Bureau's interpretation of section 703(b) for an additional reason: to preempt valid state tariffs in this circumstance would exceed the Commission's authority under the Act.

Congress went out of its way in the 1996 Act to preserve the authority of states to implement the Act's requirements and to promote local competition in a manner consistent with local conditions. As the Eighth Circuit has held, for example, Congress gave the state commissions exclusive authority under section 252 to determine the pricing of local interconnection arrangements. See Iowa Utils. Bd., 120 F.3d 800 n.21; 47 U.S.C. § 252(d). Congress also adopted a series of anti-preemption provisions to protect against improper assertions of federal regulatory authority. See, e.g., 47 U.S.C. § 261(b) (preserving state regulations that are "not inconsistent with the provisions of this part"); Pub. L. No. 104-104, Title VI, § 601(c)(1), 110 Stat. 143 (set forth as Note at 47 U.S.C. § 152) ("This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.").

Most important for present purposes, the Act expressly preserves state regulations like the tariffs governing paging carriers' interconnection to LECs in the absence of negotiated agreement. Section 251(d)(3) provides that, in regulating under section 251, the Commission:

> shall not preclude the enforcement of any regulation, order or policy of a State commission that --

> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3). The facilities charges provided for by state tariffs to permit interconnection of paging carriers networks and LECs' networks clearly "establish[] interconnection obligations of local exchange carriers." Id. Congress thus made clear that the Commission is presumptively barred from preempting such state tariffs unless the Commission can show that the state tariff is positively inconsistent with the Act or substantially prevents its implementation. The Bureau did not (and the Commission could not) meet that stringent requirement, for at least two reasons.

First, as discussed above, the reciprocal compensation obligation of section 251(b)(5) does not apply to paging carriers. Under any circumstances, therefore, section 251(b)(5) simply does not permit the Commission to dictate the terms of LEC-paging carrier interconnection. Second, even if section 251(b)(5) did have some application to paging carriers, an interconnecting carrier could enforce such rights only by entering into negotiations with an incumbent LEC pursuant to section 252. Because the Bureau purported to preempt state tariffs in the absence of such negotiation, it exceeded the scope of preemption authority under section 251(d)(3).

These concerns are important because they suggest that allowing the Bureau's interpretation to stand would raise important federalism concerns. "[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of

persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). See also California v. ARC America Corp., 490 U.S. 93, 101 (1989) (there is a "presumption against finding pre-emption of state law in areas traditionally regulated by the States"). In a field that the states have traditionally occupied -- such as the regulation of local telephone service -- courts assume that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Where Congress has neither exclusively occupied the field nor legislated in an area traditionally considered the sole province of the national government, and where there is no direct conflict between federal and state law, Congress's intent to supplant state authority must be explicit. Wisconsin Pub. Intervener v. Mortier, 501 U.S. 597, 605 (1991). There is no such explicit intent manifested here -- quite the opposite.

IV. THE BUREAU'S INTERPRETATION CONTRAVENES FUNDAMENTAL POLICIES OF THE ACT

The Bureau's determination that paging carriers are entitled to receive dedicated facilities from LECs -- for free -- without negotiations and despite the existence of valid state tariffs to the contrary misreads the Commission's regulations and conflicts with the substantive and procedural provisions of the Act. Just as important, the ruling contravenes two fundamental policies underlying the Telecommunications Act: private negotiation of interconnection agreements and promotion of competition in the local telephone market. Moreover, the decision

threatens to disrupt the relationships among LECs, paging carriers, and their customers. The Commission should not permit such a perverse result.

The Act evinces a clear preference for private negotiation over regulatory fiat. Thus the terms and conditions of interconnection agreements between LECs and interconnecting carriers are to be determined, in the first instance, by voluntary negotiations between the parties. See 47 U.S.C. § 252(a). It is only where negotiations fail to yield voluntary agreement that state commissions are called upon to arbitrate unresolved issues. See id. § 252(b).

Paging carriers have refused to negotiate because they hoped the Bureau would grant them free facilities. Now that the Bureau has done so, there is nothing to negotiate concerning the price of facilities.

It is likewise a fundamental goal of the Telecommunications Act to promote competition in the local exchange market. Here, too, the Bureau's ruling creates incentives contrary to the goals of the Act. Under the Bureau's ruling, paging carriers, given the choice of receiving free facilities from a LEC, or negotiating the terms of purchase from a competing LEC, will not find the choice difficult. The result will be to decrease, not increase, competition for local transport.

Finally, the Bureau's ruling, if permitted to stand, will undoubtedly disrupt relationships among paging carriers, LECs, and their customers, to the detriment of all. Paging carriers typically order numbers from central office throughout their license area, using foreign exchange ("FX") transport services to carry calls from distant local calling areas to their paging terminal. Paging carriers assign their customers pager numbers that will be local calls to most of the callers who will be paging those customers. In this way, the paging carriers can minimize the

intraLATA toll charges incurred by the calling parties, encouraging callers to place calls to pagers and resulting in decreased revenues to the LEC.

If the Bureau's interpretation of section 703(b) were permitted to stand, however, this would change. Because a paging carrier would no longer pay for these facilities, including FX facilities, to carry traffic from a LEC's network to the paging carrier's network, the LECs will need to reconfigure their networks to minimize their own costs and to protect their exchange customers, who under the Bureau's ruling will have to subsidize the paging carriers. The SBC LECs thus will reconfigure their networks for paging carrier interconnection, and will require paging carriers to designate a point of interface ("POI") to which traffic will be delivered. The paging carriers also would have to establish direct connections with other carriers in the same area to receive calls from those carriers. As an additional result, many paging carriers may have to rearrange their numbering resources, which could cause substantial disruption to their customers' services. Paging carriers will likely see a reduction in calls to paging units, and paging customers may see a consequent reduction in the value of paging services.

The SBC LECs describe the technical and economic implications of this change in greater detail in a forthcoming Petition for Stay. For present purposes, it suffices to say that the Bureau's decision threatens LECs with massive and unrecoverable reconfiguration costs, and it threatens paging carriers with inconvenience, expense, and disruptions in service. This result is not only unnecessary, but also positively inconsistent with the Commission's regulations and the Act.

V. THE BUREAU'S RULING EFFECTS AN UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT JUST COMPENSATION

Finally, the Bureau's ruling, if left in place, would effect a taking of LECs' property without just compensation in violation of the Fifth Amendment. By purporting to prevent LECs from recovering the cost of facilities they provide to paging carriers, the Bureau's interpretation would mean that a LEC will be unable to recover its costs for dedicated facilities, much less a reasonable, risk-adjusted return on their investments. It is settled, however, that a utility must be permitted to charge rates that will allow it to "'maintain its financial integrity, to attract capital, and to compensate its investors for the risk [they have] assumed.'" Duquesne Light Co. v. Barasch, 488 U.S. 299, 310 (1989) (quoting FPC v. Hope Natural Gas Co., 320 U.S. 591, 605 (1944)). The Bureau's ruling runs afoul of this standard.